FILE COPY

Office Supreme Court, U.S.
FILED
AUG 21 1959
JAMES R. BROWNING, Clerk

No. 331

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1958

SUPERIOR MANUFACTURING CORPORATION,
Petitioner,
vs.
HESSLER MANUFACTURING COMPANY, M. L. FOSS, INC., and HOWE MACHINE & SUPPLY COMPANY, *Respondents.*

(In the matter of Superior Manufacturing Corporation, bankrupt)

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

THOMAS K. HUDSON,
ALICE LOVELAND,

335 Petroleum Club Building,
Denver 2, Colorado,
Attorneys for Petitioner.

PEERLESS PRINTING CO., DENVER

INDEX

	Page
Opinions Below	1
Jurisdiction	2
Questions Presented	2
Statute Involved	2
Statement	2
Reasons for Granting the Writ	3
Conclusion	5
Appendix A—Opinions and Judgment Below	5
Appendix B—Statutes	10

CITATIONS

CASES:

Bryan v. Welch, 72 F. 2d 618 ..... 3, 4

In re Fuller, et al. 15 F. 2d 294 4

In re Hollywood Land & Water Co., 41 F. 2d 778 4

In re Louisell Lumber Co., 209 F. 784 4

In re Pure Milk Co., 154 F. 682 4

STATUTES:

Bankruptcy Act, Sec. 3 (a) (2),
11 U.S.C.A. Sec 21 (a) (b) 2, 4

Bankruptcy Act, Sec. 60,
11 U.S.C.A. Sec 96 (a) 2, 4

28 U.S.C.A. Sec. 1254 (1) 2

11 U.S.C.A. Sec. 11 4

No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1958

SUPERIOR MANUFACTURING CORPORATION,
Petitioner,
vs.
HESSLER MANUFACTURING COMPANY, M. L. FOSS, INC., and HOWE MACHINE & SUPPLY COMPANY, *Respondents.*

(In the matter of Superior Manufacturing Corporation, bankrupt)

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

Superior Manufacturing Corporation prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Tenth Circuit, entered in the above-entitled case on May 26, A.D. 1959; petition for re-hearing having been denied on the 23rd day of June, A.D. 1959.

CITATION TO OPINIONS BELOW

The order of the referee in bankruptcy (R. 7) is unreported and is printed in Appendix A hereto, *infra* p. 6, and the adjudication in bankruptcy (R. 11-12), unreported, is printed in Appendix A hereto, *infra*, p. 6. The order of the District Court (R. 26-27) is unreported and is

printed in Appendix A hereto, *infra*, p. 6. The opinion of the Circuit Court of Appeals, Tenth Circuit, printed in Appendix A hereto, *infra*, p. 6, is reported in Advance Sheet August 3, 1959, 267 F. 2d, p. 302.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on May 26, 1959 (R. 11; p. 6, *infra*). Rehearing was denied on June 23, 1959, R. 14. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254 (1).

QUESTION PRESENTED

Where an involuntary petition in bankruptcy is jurisdictionally defective, can an amended petition be filed which will relate back to the date of the filing of the first petition and thus toll the running of the period of limitation under Section 3 (a) of the Bankruptcy Act, 11 U.S.C.A., Sec. 21 (a).

STATUTE INVOLVED

The statutory provisions involved are Section 3(a), Section 60 of the Bankruptcy Act, 11 U.S.C.A. Sec. 21 (a), (b), Sec. 96(a). They are printed in Appendix B, *infra*, p. 11.

STATEMENT

An untitled instrument, in the nature of an involuntary petition in bankruptcy, was filed against Superior Manufacturing Corporation on September 11, 1957, the order of reference being September 23, 1957 (R. 2-4). The jurisdiction of the United States District Court was invoked because the case arises under the Bankruptcy Act.

The involuntary petition was jurisdictionally defective in that it failed to contain allegations of four of the essential elements to constitute an act of bankruptcy under Section 3 (a)(2) of the Bankruptcy Act, i.e., the following requisite affirmative allegations were conspicuous by their absence: (1) insolvency at the time of the transfer, (2) a preferential transfer within four months, (3)

on account of an antecedent debt and (4) the effect of which is to give the transferee a greater portion of his debt than other creditors of the same class.

Motion to Dismiss such involuntary petition was filed by Superior Manufacturing Corporation (R. 6) on the ground the court was without jurisdiction and on October 11, 1957, the referee in bankruptcy sustained the motion to dismiss (R. 7), but at the same time allowing the petitioning creditors a period of ten days in which to file an amended petition (R. 7).

A second petition, entitled "involuntary Petition" in bankruptcy was filed by the petitioning creditors on October 21, 1957 (R. 7-10) alleging a preferential transfer on May 16, 1957.

The referee in bankruptcy entered an order of adjudication thereon (R. 11) which order was affirmed by the District Court (R. 26). The Circuit Court for the Tenth Circuit affirmed the order of the District Court, holding that the imperfect pleading of jurisdictional facts may be corrected by amendment which will relate back to the date of the filing of the first petition (R. App. 3-7).

REASONS FOR GRANTING THE WRIT

1. A direct conflict exists between decisions rendered by the Court of Appeals for the Tenth Circuit. The decision of the court below in the instant case is directly in conflict with the decision of the same court in *Bryan v Welch*, 72 Fed. (2) 618.

The problem in issue is an important one, going to the very root and foundation of proceedings under the Bankruptcy Act. It brings into question the jurisdiction of the Bankruptcy Court, and will, therefore, be a recurring one.

The Court of Appeals for the Tenth Circuit in *Bryan v. Welch*, 72 Fed. (2) 618, unequivocally held that where an involuntary petition was deficient in the requisite allegation of insolvency, that the petition was jurisdictionally defective and must be dismissed; and that a further petition, if filed

at all, must be filed by intervenors, alleging an act of bankruptcy within the statutory four months period.

In the instant case the same court has departed from its previous decision, and now holds that even though the original petition was jurisdictionally defective, the filing of a second petition by the same persons after the expiration of the four months period will relate back to the date of the filing of the first petition.

It is not the case of jurisdictional facts being imperfectly alleged, where amendment is permitted, and the court not deprived of jurisdiction because of such imperfectly pleaded jurisdictional facts. It is a case where there was a complete absence of any jurisdictional facts, thus depriving the court of jurisdiction. *Bryan v. Welch*, 72 Fed. 2d, 618; In re Hollywood Land and Water Co., 41 F. 2d, 778; In re Pure Milk Co., 154 F. 682; In re Fuller et al, 15 F. 2d, 294. In re Louisell Lumber Co. *Armour & Co. v. Miller*, 209 F. 784.

In conflict therewith is the decision in the instant case, bringing into focus not only the direct conflict between decisions within this circuit, but also the direct conflict between decisions of other circuits. These decisions are inconsistent and irreconcilable.

2. Clearly the question presented is of prime importance in the administration of the federal bankruptcy laws. It must affect every involuntary petition filed.

The bankruptcy courts are courts of limited jurisdiction, 11 U.S.C.A. Chap. 2, Sec. 11; and the effect of the decision of the lower court is to extend and enlarge that jurisdiction beyond its statutory limitation. By judicial decision the provisions of the bankruptcy act are repealed and the period of limitation in Section 3 (a) (2) and Section 60 are rendered nugatory.

CONCLUSION

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

THOMAS K. HUDSON,
ALICE LOVELAND,
335 Petroleum Club Building,
Denver 2, Colorado,
Counsel for petitioner

August 17, 1959.

APPENDIX A

Order of referee in bankruptcy, October 11, 1957 (Pertinent portion):

> "Ordered, that * * * 12) that the motion you dismiss be and it is sustained; (3) that the petitioning creditors shall have ten days in which to file an amended petition; * * *"

Order of District Court, August 6, 1958 (pertinent portions):

> "* * * and the orders of the Referee involved in the review be affirmed and approved."

Opinion, United States Court of Appeals, Tenth Circuit,

On September 11, 1957, appellees, as creditors of The Superior Manufacturing Corporation, filed in the District Court (Colorado) a petition in involuntary bankruptcy seeking the adjudication of the named company as bankrupt. In paragraph seven of the petition the following allegation was contained:

> "7. That the debtor has committed an act of bankruptcy in that the said Debtor has preferred the claim of one of its Creditors, namely, Thomas K. Hudson, who is also an Officer and Director of said corporation by turning over to the said Thomas K. Hudson all of the stock, fixtures, furnishings, equipment and patent rights concerning the popcorn machine owned by the

said Debtor in consideration of the cancellation of an alleged obligation of the corporation to the said Thomas K. Hudson in the sum of approximately One Hundred Thousand and no/100 ($100,000.00) Dollars. That the Petitioners have no other adequate remedy other than the Bankruptcy Act and therefore Petition this Court as hereinafter set forth."

To this petition Superior Manufacturing Corporation filed a Motion to dismiss upon the grounds that "it appears from the petition that this Court has no jurisdiction in the premises, because said petition does not allege (sic) and state an act of bankruptcy, sufficient to adjudicate the respondent a bankrupt."

Since a preferential transfer to constitute an act of bankruptcy must occur within four months before the filing of involuntary proceedings against an alleged bankrupt, the referee dismissed appellees' petition as jurisdictionally defective in failing to allege such an occurrence. 11 U.S.C.A. Sec. 21 (a) (b); 11 U.S.C.A. Sec. 96 (a) *Bryan v Welch*, 10 Cir., 72 F. 2d 618; *Northwestern Pulp & Paper Co. v Finish Luth. Book Concern*, 9 Cir., 51 F. 2d 340; *Curtis v Dade County Security Co.*, 5 Cir., 30 F. 2d 325; In re Russell, D. C. Dela., 7 F. 2d 508. Leave to amend within ten days was allowed and the debtor was granted five days thereafter to respond. On October 21, 1957, (the tenth day after the entry of the referee's order) appellees as petitioning creditors filed a petition in form and substance in practical identity with the initial pleading except that paragraph seven was changed to read thus:

"7. That the debtor has committed an act of bankruptcy in that the said Debtor within four months of the filing of this Petition, to-wit, on the 16th day of May, 1957, while insolvent has preferred the claim of one of its Creditors, namely, Thomas K. Hudson, who is also an Officer and Director of said corporation by turning over to the said Thomas K. Hudson or for his benefit all of the stock, fixtures, furnishings, equipment and patent rights concerning the popcorn machine owned by the said Debtor and of the value of over $32,000.00 in consideration of the cancellation of

an alleged unsecured obligation of the corporation to the said Thomas K. Hudson in the sum of approximately One Hundred Thousand and no/100 ($100,000.00) Dollars on account of an alleged antecedent debt in the amount of between Ninety Thousand and no/100 ($90,000.00) and One Hundred Thousand and no/100 ($100,000.00) Dollars. The effect of which transfer will be to enable the said Thomas K. Hudson to obtain approximately thirty per cent (30%) to thirty-three and one-third per cent (33⅓%) of his debt, while the other creditors of the same class will receive nothing or much less than the above percentage. That at said time and place, and while the said Debtor was insolvent, the said Debtor did make the said conveyance as above set forth to the said Thomas K. Hudson or for his benefit of the aforesaid assets of the Debtor with the intention of allowing and permitting the said Thomas K. Hudson to receive a preference (sic) over Creditors of the same class as herein set forth. That the Petitioners have no other adequate remedy other than (sic) the Bankruptcy Act and therefore petition this Court as hereinafter set forth."

On October 31, 1957, the referee adjudicated Superior Manufacturing Corporation a bankrupt and upon that same date Superior tendered for filing a motion to dismiss. The tender was refused by the referee as untimely and in further proceedings the debtor was refused leave to file an answer and a motion to vacate the adjudication was denied. In subsequent review by the District Court all the orders of the referee were affirmed. Such ruling upheld the sufficiency of the petition as against the contention that it failed to allege an act of bankruptcy and further held that the referee did not abuse his discretion in refusing to permit Superior to file an answer. The debtor, now appellant, specifies each aspect of the District Court's order as error requiring reversal of its judgment.

It will be noted that in the petition filed October 21, 1957, an act of bankruptcy is alleged to have occurred on May 16, 1957, a period in excess of four months prior to the filing date but within four months of the date of the

filing of the first and defective petition of September 11. Appellant contends that the second petition is also defective because it is not an amendment to the original petition and further, even if construed as an amended pleading, the amendment does not relate back to the date of original filing. We find no merit to either contention.

An amended pleading is one which clarifies or amplifies a cause of action which can be identified with certainty as the same cause of action originally pleaded or attempted to be pleaded. It is a perfection of an original pleading rather than the establishment of a new cause of action. And the imperfect pleading of jurisdictional facts does not deprive the court of jurisdiction as of the time the action is filed if such defect is later corrected. *Stern v Beer*, 6 Cir. 200 F. 2d 794. Such an amendment is proper. *Ward Baking Co. v Holtzoff*, 2 Cir, 164 F. 2d 34; *Birby v First National Bank of Elwood*, 7 Cir., 250 F. 2d 713. Of course the intention of the bankruptcy act cannot be defeated by the filing of a skeleton petition complying with statutory requirements pleaded as generalities and then later amended to supply requisite particulars. The essential claim must be capable of determination in the original pleading and continued in the amended pleading. The most casual comparison of the allegations contained in paragraphs 7 of the two pleadings show that the pleader has intended and has accomplished an amendment clarifying and perfecting a single claim.

General Order 37 11 U.S.C.A. foll. Sec. 53 makes Rule 15 (c) Federal Rules of Civil Procedure, applicable to matters in bankruptcy and completely negatives appellant's contention that the amended petition does not relate back to the date of original filing. The rule provides:

> "Whenever the claim or defense asserted in the amended pleading arose out of the conduct, transaction, or occurrence set forth or attempted to be set forth in the original pleading, the amendment relates back to the date of the original pleading."

We conclude, as did the referee and District Court that appellees' second petition is an amended pleading to be

considered as relating back to the date of original filing, September 11, 1957, and consequently alleges an act of bankruptcy. Having so concluded, it follows that appellant's motion to dismiss and answer, both of which attacked the sufficiency of the second petition, would have availed it nothing even had it been filed within time. The referee held extensive hearings on the motion to vacate the adjudication in bankruptcy and nothing in the records indicates appellant could have made an effective defense upon the merits. Under such circumstances, no abuse of discretion appears.

Much of appellant's brief is directed to a claim that the order of the referee setting the time within which appellant could respond to the amended petition was in fact ten days rather than five as appears in the record. Such an argument cannot be presented to this court. The record of the District Court cannot be impeached upon appeal, and if in error, must be corrected in the District Court. Rule 75 (h), Federal Rules of Civil Procedure.

AFFIRMED

APPENDIX B

Bankruptcy Act
Section 3 (a)
11 U.S.C.A. Sec. 21 (a)

"(a) Acts of bankruptcy by a person shall consist of having * * * (2) made or suffered a preferential transfer as defined in subdivision a of Section 60 of this Act; * * *"

(b) "A petition may be filed against a person within four months after the commission of an act of Bankruptcy * * *, and such time with respect to the second act of Bankruptcy shall not expire until four months after the date when the transfer became perfected as prescribed in subdivision a of Section 60 of this Act. * * *"

Sec. 60 (a)
11 U.S.C. Chap. 6, Sec. 96

Preferred creditors. "(a)(1) A preference is a transfer as defined in this act, of any of the property of a debtor, to or for the benefit of a creditor, for or on account of an antecedent debt, made or suffered by such debtor while insolvent and within four months before the filing by or against him of the petition initiating a proceeding under this act, the effect of which transfer will be to enable such creditor to obtain a greater percentage of his debt than some other creditor of the same class."

FILE COPY

No. 331

FILED
SEP 17 1959
JAMES R. BROWNING, Clerk

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

SUPERIOR MANUFACTURING CORPORATION,
Petitioner,

vs.

HESSLER MANUFACTURING COMPANY, M. L. FOSS, INC., and HOWE MACHINE & SUPPLY COMPANY, *Respondents.*

(In the Matter of Superior Manufacturing Corporation, bankrupt)

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

WILLIAM L. BROMBERG,
301 American National Bank Bldg.,
Denver 2, Colorado,

EDWARD PHILIP KURZ,
714 Equitable Building,
Denver 2, Colorado,

MORRIS RIFKIN,
Symes Building,
Denver 2, Colorado,

Counsel for Respondents.

PEERLESS PRINTING CO., DENVER

No. .....

IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

SUPERIOR MANUFACTURING CORPORATION,
Petitioner,

vs.

HESSLER MANUFACTURING COMPANY, M. L. FOSS, INC., and HOWE MACHINE & SUPPLY COMPANY, *Respondents.*

(In the Matter of Superior Manufacturing Corporation, bankrupt)

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT

ADDITIONAL STATEMENT

On July 6, 1959, a mandate was issued by the United States Court of Appeals for the Tenth Circuit to the United States District Court for the District of Colorado. The Referee in Bankruptcy set the first meeting of creditors for August 12, 1959, and on that date, without objection, the petitioner appeared by its president, Glenn Mercer, and counsel, Alice Loveland. A trustee was appointed on that date and is now functioning in that capacity. No stay of mandate has been requested by the petitioner and no supersedeas bond has been filed.

REASONS FOR DENYING THE WRIT

1. Rule 19 of the Revised Rules of the Supreme Court of the United States sets forth the grounds for granting a writ of certiorari. The reasons set forth in petitioner's petition are not covered in Rule 19.

2. The case of *Bryan v. Welch*, 72 Fed. 2d 618, is not in conflict with the decision in the instant case. No amended petition was filed in that case. However, the case was decided in 1934, and by General Order No. 37, the Rules of Civil Procedure became applicable effective February 13, 1939 except where inconsistent with the Bankruptcy Act or the Orders. Rule 15(c), Rules of Civil Procedure relating to amendments is set forth in the Court's Order as reprinted in petitioner's petition at page 8.

3. At page 4 of the petition, petitioner cites cases in support of its position. A review of such cases discloses they do not support petitioner's position and are not in conflict with the instant case.

In re Hollywood Land & Water Co., 41 F. 2d 778, did hold that the amended petition in the case did not relate back to the date of the original petition, but only after the Court failed to find where the amended petition would enlarge upon, make more precise, or correct the charges of bankruptcy so deficient in the original petition.

In re Pure Milk Co., 154 F. 682, denied a motion to be allowed to amend for the reason that the application did not comply with Rule 11. Also, the case referred to the allegation of new acts of bankruptcy.

In re Fuller, et al, 15 F. 2d 294, has been specifically disapproved by *Glint Factors, Inc. v. Schnapp*, 126 F. 2d 207, in which it was stated that *In re Fuller* was incompatible therewith because of the new application of Rule 15(c), Rules of Civil Procedure.

In re Louisell Lumber Co., Armour & Co. v. Miller, 209 F. 784, held that the amendments in that case did not relate back to the time of the filing of the original petition, because no cause of action to have the debtor adjudicated a bankrupt was stated or attempted to be stated, in the

original petition. The original petition did not contain any attempt or defective effort to state an act of bankruptcy.

4. Petitioner states at page 4 that there is direct conflict between decisions of other circuits. On the contrary, the decisions of the various circuits are in accord. *Glint Factors, Inc. v. Schnapp*, 2nd Cir., 126 F. 2d 207; *Hark v. Allen Co.*, 3rd Cir., 146 F. 665; *In re Louisell Lumber Co., Armour & Co. v. Miller*, 5th Cir., 209 F. 784; *Hovland v. Farmers' State Bank*, 8th Cir., 10 F. 2d 478.

5. Collier on Bankruptcy, 14th Edition, Vol 2, Sec. 18.26, page 47, summarizes the applicable law as follows:

> "Amendments to correct a defective statement of an act of bankruptcy are allowed in the bankruptcy court's discretion, and such amendments generally relate back to the date of the filing of the original petition when they set up no new act of bankruptcy and when the original petition contains a reasonably definite statement to which the amendment may relate. Thus an amendment will be permitted to allege the debtor's insolvency, where insolvency is an essential element of the act of bankruptcy."

Similar statements appear at 6 Rev. Am. Jur. Bankruptcy, Sec. 242, page 699; 8 C.J.S. Bankruptcy, Sec. 117, page 543; Collier on Bankruptcy, 14th Edition, Vol. 2, Sec. 18.23, page 44; and Remington on Bankruptcy, Fifth Edition by Henderson, 1950, Vol. 1, Sec. 236, page 362.

6. The decision in the instant case is in accord with the general law. The original petition (R. 2-5) and the amended petition (R. 7-11) are the same in form and substance except that paragraph 7 was changed. Paragraph 7 of the original petition refers to an act concerning Thomas K. Hudson, now counsel for petitioner, and this act can be clearly identified with the act alleged in the amended petition, which is a sufficiently alleged act of bankruptcy.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

WILLIAM L. BROMBERG,
301 American National Bank Bldg.,
Denver 2, Colorado,

EDWARD PHILIP KURZ,
714 Equitable Building,
Denver 2, Colorado,

MORRIS RIFKIN,
Symes Building,
Denver 2, Colorado,

Counsel for Respondents.

September 10, 1959.